

THE WOMAN BEHIND THE BLINDFOLD: TOWARD A FEMINIST RECONSTRUCTION OF RAWLS' *THEORY OF JUSTICE*

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“The natural order is not about a good time. This is not a good
time to be against the natural order.”¹

INTRODUCTION

This Note examines John Rawls' theory of justice² through a self-proclaimed feminist³ view to determine its applicability to a sex-egalitarian society. In *A Theory of Justice*, Rawls brilliantly elaborates a novel form of contractarian theory based on justice as fairness.⁴ However, Rawls' theory fails to encompass the inequalities and complexities of male/female relationships. Rawls posits that social and political institutions should be built on justice, but explicitly exempts private associations such as the family unit from the application of justice as fairness.⁵ Rawls assumes that his theory of justice applies to all social unions. However, under this assumption, Rawls bypasses an analysis of the dichotomy between the social contract — the most funda-

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1. Jordan, *From Sea to Shining Sea*, 8 FEMINIST STUDIES 535 (1982).

2. J. RAWLS, *A THEORY OF JUSTICE* (1971).

3. For the purposes of this Note, feminism is a method by which women and men strive to accept women as integral human beings. See *supra* notes 130-37 and accompanying text.

4. J. RAWLS, *supra* note 2, at 11-17.

5. Rawls believes a public conception of justice is the basis for a well-ordered society. Rawls distinguishes the *concept* of justice from various conceptions of justice. Although the citizens in a Rawlsian society can have different conceptions of justice, the *concept* of justice prevents people from tolerating arbitrariness and prejudice. *Id.* at 5-6.

mental concept in Western libertarian philosophy — and the sexual contract,⁶ the private agreement between a man and a woman governed by the state under the laws of matrimony.

The social contract, through which individual women and men voluntarily enter a covenant with the state in exchange for an expansive protection of personal freedom, is the foundation of Western civilization. The sexual contract between a man and a woman, on the other hand, is the foundation of sexual hierarchy and female subjugation.⁷ While remaining outside the social contractarian realm, the sexual contract nevertheless serves the social contract by maintaining the social system within the natural order.⁸ For example, Rawls refers to fathers as “heads of families”⁹ when discussing “persons” in social situations. Since he assumes that the principles of justice will eventually guide social unions under the sexual contract, Rawls does not address female subjugation within the family.

This Note thus addresses Rawls’ failure to deal with sexism in the private relationships between men and women as an inherent feature of Western history, and explains how that neglect undermines the hypothesis of justice. Part I recapitulates the basic principles of Rawls’ theory of justice as they apply to a constitutional democracy of the most equitable order. However, establishing criteria for principles of justice in the public sphere is insufficient. An examination of Rousseau, Rawls’ contractarian forefather, highlights the problematic nature of Rawls’ theory as it pertains to women. One must address the private inequalities between the sexes by examining the sexual contract.

Part II begins by discussing the origins and manifestations of misogyny in Western history. I then examine the problem of difference as constituted by modern feminist analyses, questioning the ways in which this debate fails to capture the diverse essences of women’s lives. This analysis leads to a discussion of the necessity of understanding the intersections among gender, race, and class. Through establishing the importance of context in women’s lives, I emphasize the common need of women to be treated as integral persons.

The last Part of this Note returns to Rawls, discussing, first, feminist critiques of his contractarian theory. While Rawls wrongly excludes the sexual contract from the scrutiny of justice, his general principles may nevertheless be broadened to reach the private relations and institutions that serve to confine women. With recognition of women’s diverse essences, Rawls’ theory may be reconstructed to achieve an egalitarian, moral society based upon what

6. See C. PATEMAN, *THE SEXUAL CONTRACT* (1988).

7. “The story of the sexual contract is also about the genesis of political right, and explains why exercise of the right is legitimate — but this story is about political right as *patriarchal right* or sex right.” *Id.* at 1 (emphasis in original).

8. “Law is powerful as both a symbol and a vehicle of male authority. This power is based both on an ideology of law and an ideology of women which is supported by law.” Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN’S L.J. 83, 84 (1980-81).

9. J. RAWLS, *supra* note 2, at 128-30.

I label the integral independence of women.¹⁰

I.

RAWLS' THEORY OF JUSTICE AND THE SEXUAL CONTRACT

A. Rawls' Principles for a Theory of Justice

*A Theory of Justice*¹¹ introduces Rawls' neo-Kantian construction of philosophical concepts in view of achieving a just society and guaranteeing fundamental equality. His vision of a legitimate community is founded on two principles of justice: (1) the principle of basic equality, under which each person has an equal right to the most extensive basic liberty compatible with a similar liberty for others; and (2) the principle of difference, which states that all inequalities in liberty may be justified only if they provide a benefit to the least advantaged. To establish a just society, Rawls envisions parties to the social contract who, in the original position,¹² are rational and mutually disinterested.

Rawls grounds the basic canons of "justice as fairness" by investigating what role justice would play in a constitutional society:

Justice is the first virtue of social institutions . . . [L]aws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.¹³

Furthermore, Rawls states that any conception of justice expresses a conception of the person, of relations between persons, and of the general structure and ends of social cooperation. He writes:

For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements.¹⁴

Rawls' framework is as follows: (1) the people in the original position will judge the justice of legislation and social policies; (2) since individual interests might be conflicting, the citizens will decide which just constitutional arrangements are fair for the reconciliation of conflicting opinions of justice; and (3)

10. For a discussion of the elements of woman's integral independence, see *infra* notes 130-37 and accompanying text.

11. J. RAWLS, *supra* note 2.

12. To create this normative system, Rawls imagines people in an original position who possess the following characteristics and knowledge: (1) they know they are subject to the circumstances of justice; however, they do not know their own social position; (2) they do not know their place in the distribution of natural attributes; and (3) they know the first principles of social theory, but the course of history is closed to them, except for particular facts such as the size of society and its economic level. *Id.* at 136-42.

13. *Id.* at 3.

14. *Id.* at 7.

since the political process entails imperfect procedural justice, citizens must ascertain when the enactments of the majority are to be complied with and when they can be rejected as no longer binding.¹⁵ These three principles of justice, however, do not extend to private associations and the family unit.¹⁶

A Theory of Justice lays out a superb foundation for the establishment of justice.¹⁷ However, Rawls engages in what Susan Moller Okin calls an "internal paradox."¹⁸ Rawls may wonder whether contractarianism is a satisfactory framework for understanding the values of a private community.¹⁹ But he fails to conceptualize the institution of marriage²⁰ as a sexual contract into which the parties enter with unequal bargaining positions, and in which the division of labor is most insidious and oppressive.²¹ Rawls' brilliant theme, therefore, stops short of entering the private sphere, which has been instrumental in maintaining the socio-political superstructure, supporting a patriarchal system of power, and subjugating over half of the population.

Although the individual and society are the subjects of contractarian philosophy, the development of contractarian thought originates from centuries of the study of men and the multitudinous and complex relationships between their freedom of conscience and their government.²² Throughout this history, women were consciously left out of the public sphere and the political process.²³

Like his predecessors in contractarian philosophy, Rawls fails to encompass men *and* women in his definition of persons.²⁴ Although he assures his

15. *Id.* at 195-96.

16. Rawls mentions the monogamous family as a major institution, but cautions that the two principles of justice may not apply to private associations or social unions. *Id.* at 8.

17. "It has fit, in that each piece of the argument builds carefully upon the preceding piece. It has heart, in that it strives to achieve the most important of theoretical tasks: the development of a social order that will protect and promote the human spirit." Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613, 614 (1986) [hereinafter Matsuda, *Liberal Jurisprudence*].

18. S. OKIN, JUSTICE, GENDER AND THE FAMILY 108 (1990).

19. J. RAWLS, *supra* note 2, at 520.

20. Western feminists, from the Pankhurst sisters and Virginia Woolf to Germaine Greer, from the era of Simone de Beauvoir to that of the radical feminists of the late twentieth century, have often bitterly criticized the notion of marriage as it exists. Such critics consider it the oldest patriarchal institution aimed at the legal oppression of women. See, e.g., B. CASTLE, SYLVIA AND CHRISTABEL PANKHURST (1987); G. GREER, SEX AND DESTINY: THE POLITICS OF HUMAN FERTILITY (1984); V. WOOLF, A ROOM OF ONE'S OWN (1929).

21. While the sexual contract is not limited to marriage, it is the *concept* of this institution which influences relationships between men and women generally.

22. See D. RICHARDS, TOLERATION AND THE CONSTITUTION 57-63 (1989) (discussing the broad history of contractarian philosophy and the traditions from which it developed).

23. "Social contract theory bases the allocation of rights and duties on conceptions of what the abstract reasonable person could accept. The concepts of abstract reasonable persons and rational acceptance are affected by prevailing social standards. In our society men are the political, economically and socially dominant sex." Allen, *Taking Liberties: Privacy, Private Choice and the Social Contract Theory*, 56 U. CIN. L. REV. 459, 489 (1987).

24. The concept of a person is central to each and every problem of philosophy. 'Person' is generally treated as an explicitly gender-homogeneous concept: both men and women are in the same sense persons. Thus, it is thought to be merely a trivial matter

readers that women have a just and equal place in his theory of justice, he avoids an analysis of the specific and historic role of women.²⁵ Rawls' inadequate consideration of the subjugation of women and his assumption that the "abstract" person is male²⁶ creates a gap in his search for equal justice and equal respect. Guaranteeing women political and legal rights in the public sphere is insufficient. Our rights must be assured in private institutions.²⁷ The failure to address the subjugation of women goes beyond the cosmetic convenience of incorporating the female gender into the framework of the male gender and making the latter neutral. An assumption of gender neutrality neglects an historical analysis of men's subjugation of women in both the public and the private spheres and avoids an analysis of the socio-political separability of the two genders.

Rawls' theory contradicts itself on two points. On the one hand, he mentions that in a "well-ordered" society, each individual understands the principles of justice as fairness, constituting one's private life as a plan within the Rawlsian framework.²⁸ On the other hand, he engenders the family by assigning its helm to heads of households,²⁹ who are traditionally fathers. The people in the original position — the just, impartial, and compassionate people who establish the principles of justice — are not entitled to settle questions of justice within families.³⁰ Yet Rawls sees the family as the institution which instills justice and moral principles. But, as Okin asks, how can children develop a sense of fairness within the family if the relationship they see is one of domination by fathers over mothers or one of unequal distribution of primary care and attention?³¹ In a complete moral theory, one cannot dismiss the private sphere as neutral and irrelevant to the public/political sphere.³²

The issue then becomes whether the equality of women in the public

of cosmetic revision to substitute a 'person' for 'man' in such historical claims as 'man is a rational animal.' . . . The philosophical conceptions of a citizen, of justice, of a moral person, of 'the rational man' . . . have all been tied to gender specific masculine conceptions of what the 'male man' should be.

Harding, *Is Gender a Variable in Conceptions of Rationality?*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* 42, 48 (C. Gould ed. 1983).

25. This omission stands in contrast to Rawls' emphasis on Western philosophy, history, and constitutional democracy.

26. For example, Rawls speaks of a "father" who has the responsibility to secure equal liberties for his descendants. J. RAWLS, *supra* note 2, at 209.

27. "[W]omen's relationship with privacy has been difficult. On the whole, women have had too much of the wrong kinds of privacy. They have had modesty, chastity and family homes when what they have needed are the forms of privacy that foster moral independence." Allen, *supra* note 23, at 471.

28. J. RAWLS, *supra* note 2, at 527.

29. *Id.* at 128.

30. Okin, *Review of Women and Moral Theory*, 99 *ETHICS* 235, (1988).

31. See S. OKIN, *supra* note 18, at 17.

32. A significant volume of feminist work has attempted to show how the family is the strongest oppressor in the private sphere. The family is frequently treated as an autonomous realm deserving protection from public intervention, so that the state enters into issues of domestic violence, allocation of child care, and the impoverishment of women after divorces as infrequently as possible. See Fraser, *Talking About Needs: Interpretive Contests as Political Con-*

sphere is sufficient to assure that women will be treated as moral equals in the private sphere of patriarchy and male self-interest. Under the Rawlsian theory, because women are citizens equal before the law, one assumes that women benefit from equal power within private associations³³ or marriage.³⁴ This assumption rests on false hopes unless close scrutiny is given to the dynamics of the private domain.³⁵ Rawls' failure to explicitly address the dichotomy between private marital, familial relationships and the public sphere of politics ignores the origins — and consequently the remedies — of the subjugation of women.

B. Rousseau's Influence on Rawlsian Contractarian Theory

The social contract is a history of freedom; the sexual contract is a history of oppression.³⁶ Social contractarian theories have shaped modern Western civilization and contributed immensely to American and European constitutionalism.³⁷ Rousseau, as one of the founding fathers of Western political theory, inspired Rawls in thinking about the social contract. As a result, Rawls writes in the tradition of eighteenth-century Western European philosophers and vows to improve on their ideas of justice and the social contract.³⁸ He fails, however, to critically examine the assumptions of his contractarian "philosophical fathers."

In *A Discourse on Inequality*, Rousseau establishes two principles antecedent to reason: an ardent interest in man's own well-being and preservation and a natural aversion to seeing any other sentient being perish or suffer.³⁹ Man, Rousseau says, will never do harm to another sentient being, except in a legitimate case where his interest in his preservation is at stake.⁴⁰ Rousseau

flicts in Welfare-State Societies, 99 ETHICS 291 (1988). See generally Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

33. This is John Hart Ely's rationale for not categorizing women within the suspect classification model under the equal protection clause. He believes that instances of first degree prejudice against women are "obviously rare." He implies that women are now in a position to protect themselves since they constitute a majority and therefore have power in the legislative process. See J. ELY, *DEMOCRACY AND DISTRUST* 164-70 (1980).

34. The situation of romantic love is a morally paradoxical and deeply threatening one for women. It is morally paradoxical because it requires submission to and identification with another in the name of one's own growth and identity realization. It is deeply threatening because, almost by definition, it entails identity destroying servility as its operating dynamic and underlying moral principle.

Morgan, *Women and Moral Madness*, in *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHOD AND MORALS* 157 (L. Code, S. Mullett & C. Overall eds. 1988).

35. As Pateman points out, "social contractarians either ignore or endorse marital subjection. To omit the (hi)story of sexual contract is to avoid recognition of sexual difference, the meaning of gender, and its power hierarchy." C. PATEMAN, *supra* note 6, at 16.

36. See *id.* at 2.

37. See generally D. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONISM* (1990).

38. "My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant." J. RAWLS, *supra* note 2, at 11.

39. J.-J. ROUSSEAU, *A DISCOURSE ON INEQUALITY* 70 (M. Cranston trans. 1984).

40. *Id.* at 71.

also explains that there are two types of inequality in the human species: “natural inequality,” stemming from physical differences found in nature, and moral or political inequality, deriving from a corrupt convention. While Rousseau intends to abolish the latter, he urges us to leave the former alone, for it is beyond our capacity to question. By elaborating a dichotomy between the “natural” and the “moral/political,” Rousseau eliminates historical explanations of inequality, and in the same sweep, validates his philosophy by looking to philosophical history.⁴¹

Under Rousseau’s first principle antecedent to reason—that of “natural inequality”—he implies that women must be subservient to men at all times.

In the union of the sexes, each alike contributes to the common end, though in different ways. From this diversity springs the first difference: . . . one should be strong and active, the other weak and passive [I]t follows that woman was specifically made to please man. . . . I grant you this is not the law of love; but it is the *law of nature*⁴²

Rousseau believes that woman is “naturally” the servant of man, created to complement his power and rational intelligence. She is to serve his needs for love and companionship and his need to procreate at the expense of her autonomy.⁴³ Due to Rousseau’s interpretation of woman’s role in society,⁴⁴ his notion of suffering is limited to political harm done to the societal male’s physical and psychological integrity. The female is explicitly excluded from his reasoning, because her realm is domestic, one in which she must remain subservient to man’s public and private needs.

Although Rawls admires Rousseau’s brilliant interpretation of the social contract, and extracts from Rousseau the idea of citizenship and justice within a political democracy, he does not address Rousseau’s fundamental contradiction between the “discourse on inequality” and Rousseau’s views on gender differences. Instead, he characterizes Rousseau’s *Emile* as an innovative treatise on the education of man, his self-preservation, and the reconciliation between nature and history.⁴⁵ While Rawls rejects Rousseau’s limited tolerance of individuals who consciously do not abide by the social contract as “running afoul” of Rawls’ principles of justice,⁴⁶ he fails to contest as mistaken and unjust Rousseau’s views on women.

41. *Id.* at 77.

42. J.-J. ROUSSEAU, *EMILE, OR ON EDUCATION* 77 A. Bloom trans. (1979) (emphasis added) [hereinafter J.-J. ROUSSEAU, *EMILE*].

43. See J.-J. ROUSSEAU, *A DISCOURSE ON INEQUALITY*, *supra* note 39, at 109.

44. In *Emile*, Rousseau urges Sophie, *Emile*’s counterpart, to stay within the confines Nature has reserved for her. A girl’s restrictive education is needed under *Emile*’s principles to preserve the “natural” or “ideal” characteristics of girls and boys from being distorted. Sophie has to be taught that dependence is woman’s natural state. Her moral obligation is to stay with her husband even in situations of injustice and violence. See J.-J. ROUSSEAU, *EMILE*, *supra* note 42.

45. *Id.* at 463, 540.

46. J. RAWLS, *supra* note 2, at 216.

Thus Rawls ignores the misogyny of *Emile*,⁴⁷ although the text should have prompted him to address Rousseau's prejudiced view on the education of girls. Instead, Rawls incorporates the Rousseauvian discourse on "nature" in his theory, requests that women cooperate in realizing their matching nature,⁴⁸ and capitulates to the idea of "nature" and sexual affinity⁴⁹ when addressing "private associations."

Rawls, of course, does not follow the theory of sexual domination that emerges from Rousseau's writings, since such a theory would contradict his fundamental concept of justice as fairness. However, Rawls' principles give rise to a contradiction when he submits that "religious intolerance and racial discrimination are unjust,"⁵⁰ while treating gender as a morally irrelevant characteristic. Rawls mentions that justice as fairness appraises the social system from the position of equal citizenship. Thus, if men are favored in the assignment of basic rights, such inequality would be justified by the difference principle,⁵¹ but only if it would be to the advantage of women and acceptable from their standpoint. Unfortunately, Rawls is vague about what he means when he refers to standpoint, leaving the reader to deduce contextually that he refers to a "political/public" position.

The result of Rawls' assumption is that justice in the public sphere is expected to trickle down to establish justice within the family. That result corrupts Rawls' ultimate goal of establishing a fair society. He touches on the idea that the family can be "a barrier to equal chances between individuals,"⁵² and wonders whether the family should be abolished. But he justifies the family as necessary to prevent the monopolization of economic or political opportunities, disregarding its character as a nest of sexual inequality.⁵³

Like Rousseau, Rawls distinguishes between the family and the state, as two separate bodies governed by different laws. The family, Rousseau explains, cannot be equated with a democratic state.⁵⁴ Rousseau believes that an

47. "Woman, honor the head of your house. It is he who works for you, who wins your bread, who feeds you. This is man." J.-J. ROUSSEAU, *EMILE*, *supra* note 42, at 437.

48. Yet one basic characteristic of human beings is that no one person can do everything that he might do; nor a fortiori can he do everything that any other person can do Thus everyone must select which of his abilities and possible interests he wishes to encourage Different persons with similar or complementary capacities may cooperate so to speak in realizing their common or matching nature.

J. RAWLS, *supra* note 2, at 523.

49. "[S]exual affinity is the most obvious example of the need of individuals both human and animal for each other. . . . Unless this attachment is fused with elements of affection and friendship, it will not exhibit the characteristic features of social union." *Id.* at 525.

50. J. RAWLS, *supra* note 2, at 19.

51. The "intuitive" idea of the difference principle is that the social order cannot offer a better social position to certain citizens to the detriment of less-advantaged citizens. Equal distribution of justice must first and foremost apply to the advantage of the less fortunate. Thus, the difference principle is an egalitarian concept in that the principle makes "weaker" people better off. *Id.* at 75.

52. *Id.* at 301.

53. *Id.* at 511.

54. J.-J. ROUSSEAU, *A DISCOURSE ON INEQUALITY*, *supra* note 39, at 124-27.

application of the "father of the family" model to the political sphere would lead to monarchy, an unjust order. One sphere is governed by the law of nature, the other by a social contract. The government cannot have a single voice, or the sole power to command like the father does in the private family. Citizens, unlike children, cannot obey out of gratitude and natural order. In contrast to citizens in a political economy, the mother and the father cannot be made equal.⁵⁵

If Rawls' "heads of families" are fraternal members of society, children will never be exposed to the moral foundation that Rawls trusts the family to teach their offspring.⁵⁶ The socialization of children begins in a gendered family, which teaches them the essence of a segregated workforce, the sexual division of labor.⁵⁷ The most restrictive definition of family, as the product of a conventional marriage, is a representation of male ideological power. Many argue that the family⁵⁸ as a Western institution is the essence of the patriarchal order.⁵⁹ The family structure both imposes and reflects the morality of a given society.⁶⁰ The family also comprises a normative legal structure that is defined by law. The politics of reproduction, the right to have or not to have children, the right to contraception, maternity leave, and housework wages regulate the female body within the family according to the current ideological

55. "A husband should oversee his wife's conduct for it is important to him to be assured that the children he is forced to recognize and nurture belong to no one but himself. The wife, who has nothing like this to fear, does not have the same right over her husband." J.-J. ROUSSEAU, *EMILE*, *supra* note 42, at 164.

56. As Okin points out, the "head of family" is not always a man. However, the term "female-headed household" usually indicates socio-economically disadvantaged families, particularly of African and Latino descent. "[I]n common usage, the term 'female-headed household' is used *only* in reference to households without resident male adults implies the assumption that any present male takes precedence over a female as the household or family head." S. OKIN, *supra* note 18, at 92 (emphasis in original).

57. *Id.* at 124.

58. Note the origins of the word from the Latin *familia* or *famulus*, meaning slave or servant. Originally *familia* designated the house dominated by the master (*dominus*) who reigned over his wife, children, servants, and slaves. Many anthropologists have long believed that the "primary basis" of the family rests on a biological and psychological foundation. It is "natural" that one sex is attracted to another, and "instinctual" that they wish to reproduce. See C. LÉVI-STRAUSS, *PRÉFACE À L'HISTOIRE DE LA FAMILLE*, VOL. I: MONDES LOINTAINS, MONDES ANCIENS (1973).

59. Anthropologists such as Lévi-Strauss believe that the taboo of incest was at the heart of the exchange of women, later transformed into the institution of marriage. See C. LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURE OF KINSHIP* 8, 10, 12, 62-63 (1969). Simone de Beauvoir proposes a Marxist theory for the origins of patriarchy, linking it to the division of labor, exacerbated by the rise of capitalism. See S. DE BEAUVOIR, *THE SECOND SEX* 58-67 (H. Parshley ed. 1952).

60. The nuclear family structure was consolidated during the sixteenth through eighteenth centuries in Western Europe. Between 1560-1740, both Church and State institutionalized their morality in the form of family, creating a more apparent barrier between the public and private spheres. "The rather exuberant 16th century was followed by a long authoritarian and ascetic 17th century. The convergent efforts of Church and State imposed a uniformity upon behavior by using the family as a tool to impose morality on the social body. This morality favored the married couple and suppressed all extramarital sexual activity." Bourguière, *The Formation of the Couple*, 12 J. FAM. HIST. 39, 40 (1987).

beliefs of our society.⁶¹ The ethic of the family thus becomes distinct from the ethic of a just society. The persons behind the "veil of ignorance" create a just society, while the fraternal "heads of families" perpetuate patriarchy or an unjust familial structure.⁶²

If Rawls' central idea is that injustice is an arbitrary inequality in the distribution of liberty, then he must accept not only that nature is arbitrary in distributing talent, but that it is also arbitrary in distributing the gender of human beings.⁶³ Furthermore, if an individual's gender is arbitrary, then the characteristics attributed to gender should also be arbitrary, and not definitive or descriptive of that individual's behavior. Rawls' principled rectification of nature's casual distribution should therefore be explicitly applied to gender, and his theory of justice to the family unit and private associations.

II.

FEMINIST CRITIQUES OF CONTRACTARIAN VIEWS OF WOMEN, AND THE DICHOTOMY BETWEEN THE SEXUAL AND SOCIAL CONTRACTS

A. *Historical Aspects of the Subjugation of Women*

"One is not born Woman; one becomes one."⁶⁴ This sentence, one of the most influential in the history of Western feminism, lays down the fundamental, definitional problem of woman. The question every scholar interested in feminist issues asks is how and why did female oppression begin?⁶⁵ Did men

61. Foucault's theory of state interference in the sexual lives of citizens finds support in our constitutional tradition. Foucault talks about the history of political economy and its relationship to the regulation of the sexual behavior of citizens.

Through the political economy of population . . . moral and religious exhortations, [and] fiscal measures [society] tried to transform the sexual conduct of couples into a concerted economic and political behavior. In time these new measures would become anchorage points for the different varieties of racism of the nineteenth and twentieth centuries. It was essential that the state know what was happening with its citizens' sex, and the use they made of it Between the state and the individual, sex became an issue, and a public issue no less

See M. FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION* 26 (1978); see also L. IRIGARAY, *SEXES ET PARENTES* 13 (1987).

62. When Luce Irigaray discusses Hegel's *Phenomenology of the Spirit*, she notes that a chapter on the family considers the question of ethics and its relationship to morality. For Irigaray, this Hegelian relationship is one where girls who remain faithful to the laws of their mother are excluded from the City, as was Antigone. Under patriarchy, the girl is separated from her mother and her family and transported to her husband's patrilineal branch. The erasure of the girl's maternal genealogy is an ethical mistake which perverts the spirit of people and prohibits the formation of an ethic of the couple. See L. IRIGARAY, *supra* note 61, at 15.

63. Which, as Okin points out, Rawls fails to do. See S. OKIN, *supra* note 18, at 91.

64. S. DE BEAUVOIR, *supra* note 59, at 13. De Beauvoir's thesis asserts that no biological, psychological, or economic destiny defines the person of woman as she is defined in society. Rather, it is civilization as a whole that has elaborated an intermediate product between the male and the castrate and qualified it as female, inferior to males.

65. Gerda Lerner provides a framework for the identification of the origin and perpetuation of sexual domination of men over women. She believes the appropriation by men of women's sexual and reproductive capacity occurred prior to the formation of private property.

begin oppressing women with the development of the division of labor,⁶⁶ confining women to childcare and related household tasks?⁶⁷ If so, then at which point did society decide that mothering was less noble or valuable than hunting or gathering?⁶⁸

The development of misogyny may be traced at least to the Classical period. Aristotle and Plato wrote in a cultural tradition of misogyny and a social context of female subjugation.⁶⁹ The theogony tells the story of a time when men lived happily without women. The female sex was irrelevant to their birth and existence; they became men *sui generis*, the issue of male gods.⁷⁰ Misogyny inheres in the Judeo-Christian tradition as well.⁷¹ The ancient

For Lerner, the archaic states were organized in a form of patriarchy. Men learned to institute dominance over other people by their earlier practice of dominance over women. Women's subordination was instituted in earliest law codes and enforced by full power of the state. Women's cooperation with the patriarchal regime derives from force, economic dependence on the male head of the family, and an artificially created division of women into respectable and non-respectable women. See G. LERNER, *THE CREATION OF PATRIARCHY* 89 (1989).

66. Many feminist writers believe female subjugation by men derives from the inescapable sexual division of labor. See S. DE BEAUVOIR, *supra* note 59, at 755-60. Others such as Shulamith Firestone contend that the sexual division of labor has a biological basis. S. FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION*, 81-82 (1970). These theories have been rejected by radical feminists since the 1970s because contemporary radical feminism attempts to avoid blaming women or women's physiologies for their subordination.

67. See S. DE BEAUVOIR, *supra* note 59, at 480.

68. Engels called this development the "world historical defeat of the female sex." F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 87 (M. Barrett ed. 1972). Engels' theory primarily targets Western society, but is not limited to it. Anthropologists have noted that the roles of many Native American women in Northern America prior to the arrival of Europeans starkly differed from those of European women. Several tribal societies, including the Iroquois, Mandan, Hopi, Zuni, Navajo, and Eastern Pueblos, were matrilineal and matrilocal. In matrilineal society, all women are blood relatives and all males are outsiders. Only the daughters inherit the rights to the fields, thus the means of production. The husband was the spouse who joined the woman's household. The women also controlled a large share of the political and religious spheres. See Witt, *Native Women Today: Sexism and the Indian Woman*, in *FEMINIST FRAMEWORKS, ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 24 (A. Jaggar & P. Rothenberg eds. 1984).

69. Diana Coole recounts these lines from Aeschylus' *Eumenides*:

How else did she nourish you under her girdle, murderer? Do you disown your mother's blood? The god replies that although she might have nourished the embryo, the mother is not strictly a parent: She who is called the child's mother is not the begetter, but the nurse of the newly sown conception. *The begetter is the male* and she is a stranger who preserves the offspring.

D. COOLE, *WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM* 19 n.27 (1988) (emphasis added).

70. *Id.* at 14-16.

71. French feminists argue that a combination of Roman, German and, Canon laws defined the situation of women in "Gaulle" in the first century of this millennium. The Celtic society before Roman invasion rested on a principle of collective ownership of property. The woman was not excluded from chattel contracts (*contrats de cheptel*); she was never married without her consent; she had considerable power in the administration of the city. The couple did not form a new unit, rather each member continued to belong to his or her clan. Before the arrival of Christianity, a woman was not perceived as sin incarnate. See M. ALBISTUR & D. ARMOGATHE, *HISTOIRE DU FEMINISME FRANÇAIS, VOLUME 1*, at 11 (1977); see also D. COOLE, *supra* note 69.

myth of the story of Eve portrays woman as temptress and destroyer of the earthly paradise, Eden. As a consequence of her sin — that of giving Adam the Fruit of Knowledge — she is condemned to suffer in childbirth, to obey her husband, and to accept her lot without protest.⁷² This teaching of silent self-abnegation persists throughout Judeo-Christian religious writing, influencing non-religious literature and permeating the education of girls into the twentieth century.⁷³ Similar geneses of female subjugation have been found in non-Western cultures, including Asian and African civilizations.⁷⁴

The question remains whether female subjugation inheres in the human condition or whether a Rawlsian society can eliminate misogyny. In Western history, man has always fought his own mortality. From the myths of the Fountain of Youth to the desire to surpass his physical limitations by flying,⁷⁵ man aspires to equal the gods, to become intimately associated with the mysteries of Nature, astrology, astronomy, and the metaphysical. Woman, on the other hand, is flesh. As the childbearer, she is man's reminder of his mortality; her existence anchors man to the soil and the base details of life. Man's oppression of woman is therefore the suppression of his own mortality. Woman prevents man from attaining the highest form of purity,⁷⁶ and yet without her; he would be destroyed. The compromise between eliminating the woman from his personal sphere and maintaining his own survival by keeping her

72. To the woman He said: "I shall give you great labour in childbearing; With labour you will bear children; You will desire your husband, but he will be your master." And to the man He said: "Because you have listened to your wife . . . on your account the earth will be cursed."

Genesis 3:16-17.

73. Theorist have traced the time when parents differentiate between their girl and boy children, finding that sex-differentiated education begins as early as pregnancy. Gendered socialization occurs much more dramatically from the time the parent(s) identify the sex of the child. From that point on, girls' education differs fundamentally from that of boys. See generally E. BELOTTI, *LITTLE GIRLS: SOCIAL CONDITIONING AND ITS EFFECTS ON THE STEREOTYPED ROLES OF WOMEN DURING INFANCY* (1975). This theory is illustrated by society's "color-coding" (pink and blue) of infants by sex. This de facto segregation between the sexes dictates and establishes the roles society expects males and females to play from birth on.

74. See, e.g., *WOMEN AND SLAVERY IN AFRICA* (C. Robertson & M. Klein eds. 1983). This near-universality indicates that misogyny, although developed and fortified in the Judeo-Christian tradition and by Western political theorists, is not unique to our cultural and political tradition.

75. For example, after Daedalus sculpts wax wings for his son Icarus, the boy begins a quest to surpass his mortal limitations, and flies beyond the limits set by his father. As Icarus approaches the sun, his wax wings melt and he falls into the Aegean Sea. For daring to surpass human limitations, Icarus is punished by death. OVID, *METAMORPHOSES* (A. Melville trans. 1987).

76. This insight lends meaning to the Roman Catholic priestly vow of celibacy. The relation between body and soul is central to an understanding of the distinction between earthly and heavenly cities and to women's place therein. See generally ST. AUGUSTINE, *THE CITY OF GOD* (1950). St. Paul the Apostle's writings cemented the traditional Judaic misogyny to Catholic teachings. See 1 *Corinthians* 2:8-9 ("May the woman submit to her husband like the Church to Christ."). Mortification of the flesh permeates Pauline philosophy. Virginity is a source of perfection, and virginity or maternity are the sole salvations of woman, bearer of the original sin. See M. ALBISTUR & D. ARMOGATHE, *supra* note 71, at 14.

within his realm in a strict geographical confinement, namely the home, is marriage.⁷⁷

Under the terms of the sexual contract, the female procreates without interfering with her male mate's socio-political sphere. She is not a party to the social contract, as her participation in the *polis* would corrupt the economic and political balances of the public sphere. Her duties are of a domestic, reproductive, and psychological nature; her status is a reflection of her husband's. She is a product of the social contract, an unequal partner in the sexual contract.

This history of the sexual contract connects with the barbarian underside of Western social contractarian societies, in which "marginal" populations that lack standing in the social contract are subjugated, brutalized, and exterminated. Rousseau's conception of woman as a victim of nature reduces her to subhumanity because of her womb. Slaveholders in the new American republic systematically raped African women to expand the slave population.⁷⁸ Throughout the history of the United States, the political plight of women was conspicuously ignored,⁷⁹ as the American woman was denied liberty: she was stifled and degraded in her attempt at free speech; she was precluded from sole ownership of property; she was restricted in her freedom of movement; she was limited in her autonomy to that of either her master, her father, or her husband, and as an extension of these men, the court system.⁸⁰

77. "When Genesis is interpreted allegorically, woman the childbearer will be identified with the flesh, itself a threat to devotion and purity Marriage, the sacrament which subjects passion to reason will therefore properly subject woman to man." D. COOLE, *supra* note 69, at 58.

78. By the early seventeenth century in the United States, African-Americans were legislatively and philosophically considered subhuman. Because interracial coupling was considered a threat to the continuation of the white race, unions between a white woman and a Black man were punishable by expatriation from the colony. However, the impregnation of slave women by their "masters" was tolerated as it guaranteed a permanent and free labor force. Unlike the French in the Caribbean who freed the children born of their unions with African women, American slaveowners kept such offspring in servitude. See generally P. GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984).

79. Abigail Adams wrote to her husband, John, in 1776:

I long hear that you have declared an independence — and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could

P. LEVIN, *ABIGAIL ADAMS* 82 (1987).

80. If the Constitution is the legal foundation of the United States, then the Supreme Court is the institution that should distribute fundamental rights. From our long history of male glorification and female subjugation, there logically follows the sexist tradition of the United States Supreme Court. Apart from the rare "just" case, the reasoning of most Justices leads our constitutional history to the perpetuation of male domination. The legacy of a misogynist Western philosophy appears in the interpretation of gender-based statutory and non-statutory discrimination. One notable example is the application of the Court's overt double standard for women in *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon law forbidding females to be employed in any factory or laundry for more than ten hours). In his opinion

Finally, in the abomination of Nazism, which exemplifies the existence in Western societies of extreme prejudices of one group of people against another, considered subhuman, women were perceived as chattel.⁸¹ Their sole saving point was their ability to bear children, necessary to advance the "Aryan" race.⁸² The Nazis punished abortion and contraception by death or incarceration in concentration camps. The regime thus destroyed the whole of a woman's privacy and self-identity. Her life became contingent upon the Führer's nationalist goals; her sole function was to populate the world with Aryan babies.⁸³

In all these cases, man's domination is validated through his political power; woman is the ultimate tool of public use and property. Although Rawls writes in the tradition of Rousseau's philosophy, he fails to confront these terrifying manifestations of his refusal to include woman in the social contract. Where did Western moral philosophy go wrong?

B. *The Question of Equality and the Question of Difference*

Despite this history, the most organized feminist movements in the West originated in social contractarian democracies⁸⁴ as women, and a few men, sought to free women from socio-political oppression.⁸⁵ Their primary goal

for the Court, Justice Brewer justified the statute on the grounds that the liberty of contract was not absolute, particularly when women are involved, and the woman's body comes into the realm of the public interest in safeguarding its health for the unaltered production of offspring. *Id.* at 421. Here, the women's most private choices become public in the eye of the law.

81. As soon as the Nazis gained power, they drove women out of posts of responsibility in various sectors of public life, just as they did with the Jews. They also instituted a *numerus clausus* in institutions of higher education. The Third Reich ordered women to place their bodies at the disposal of the regeneration of the German race. Of course, this callous treatment was still better than that of Jews of both genders, whom the Nazis attempted to exterminate. See E. BADINTER, *MAN/WOMAN: THE ONE AND THE OTHER* 110 (1989).

82. According to Nazi theory, Jews created "feminism" (as well as "communism"), and generated unemployment. See B. CLASSEN & G. GOETTLE, *Le Juif nous a volé la femme*, in *LES FEMMES ET LEURS MAÎTRES* 17 (1978).

83. Nazi ideology was permeated with the notion that a woman is an animal who procreates and whose universe is limited to the family. The Nazis characterized the idea of equality between women and men as a *Jewish* idea. In contrast, the young German girl becomes a citizen *only* when she marries; her unique task is to serve men. See generally A. HITLER, *MEIN KAMPF* (Reynal & Hitchcock eds. 1941).

84. For a discussion of feminist movements in France, see L'HISTOIRE DU FEMINISME FRANÇAIS (1981); for Great Britain, see R. STRACHEY, "THE CAUSE": A SHORT HISTORY OF THE WOMEN'S MOVEMENT IN GREAT BRITAIN (1928); for the United States, see W. O'NEILL, *FEMINISM IN AMERICA: A HISTORY* (2d ed. 1989).

85. Frederick Douglass, for example, supported efforts of women to gain political rights, at least until the choice narrowed to either granting women or Black men the right to vote. See P. GIDDINGS, *supra* note 78. In 1673, de la Barre proposed that equality is to be total because women and men, endowed with the same reasoning power, are similar in almost every respect. P. DE LA BARRE, *L'ÉGALITÉ DES DEUX SEXES* (1673). This theory of femininity in men and masculinity in women parallels Plato's mythical story in *The Symposium*, where Plato imagines the *androgyné*, or third sex, who took on the nature of both sexes. See E. BADINTER, *supra* note 81.

was to seek "equality" in the political sector. However, the very definition of "equality" has triggered a rigorous debate among prominent feminists.

One school of thought focuses on the essential differences of women. For example, the work of Carole Gilligan concludes that the moral development of girls differs from that of boys.⁸⁶ Boys reason morally in abstract terms of individual justice and power. Girls reason morally according to notions of community problem-solving and interpersonal relationships. Gilligan argues that female methods of responsiveness, connection, and appreciation are as necessary to good moral thinking as are male modes of abstract reasoning, autonomy, and concern for equality. But because contractarian theorists utilize the latter, women are excluded from contractarian models. Gilligan's theory isolates a major cognitive difference between women and men, namely that of different conceptions between the "self" and the "community" in moral discourse. Her study proposes that both sexes need to learn from each other.

Gilligan's conclusion, however, begs the question as to whether women are truly different from men in their intellectual constructions of social philosophy and justice. Gilligan does not locate the etiology of the differences between the boys and girls she studies. A man defines himself in terms of his career, a woman by the standard and character of her relationship with a man. The man enters the marriage contract as an autonomous and independent human being. The woman often considers marriage an end in itself, a first step toward the final roles of woman, wife, and mother. One need only look at the symbolism often still present in the modern ceremony of marriage. Walking down the aisle, the woman is "handed over" to the groom by her father; she thus transfers her body from one male protector to another. The veil is removed by the groom who kisses her to seal the vows. The white gown remains the emblem of purity, chastity, and virginity. The traditional wedding costs are incurred by the bride's parents, a vestige of the dowry which equates women with chattel or other material goods. The husband carries the new bride over the threshold of the honeymoon suite or the new home, the rapture of the virgin into the man's domain. Gilligan correctly states that women's voices are distinct. Yet these voices differ because girls' and women's socialization is distinct.⁸⁷

In the last decade, feminists have focused on creating a different language and normative system to define women's autonomy in "female" terms.⁸⁸ They contest the formal model of equality, which relies on male standards. In so

86. C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

87. For a more thorough discussion of the ways in which the educational experiences of girls and boys differ, see E. BELOTTI, *supra* note 73.

88. French and American female writers are striving to reinvent a female language distinct from the male language, which is seen as a tool of internal oppression. See M. DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* (1978); N. SARRAUTE, *THE USE OF SPEECH* (1983); L. IRIGARAY, *PARLER N'EST JAMAIS NEUTRE* (1985).

doing, feminists inquire: equal for what purposes?⁸⁹

Feminist jurisprudence initially argued for equality as a primary vehicle for women to gain access to political and economic structures and to be treated in the same way as similarly situated men. This argument for equality assumes an assimilationist perspective, which holds that women are equal to men in every respect.⁹⁰ Since male canons of power regulate a legal system in which women are not considered equal to men, many feminists wholeheartedly engage in the formal equality debate, treating formal equality as a means to reach substantive justice.

Among the current debates in feminist thought is one between "symmetrists" and the "asymmetrists."⁹¹ The strict egalitarians, or "symmetrists," contend that advancing differences in gender-based constructs provides for superficial comparisons which allow men to restrict women to the private sphere.⁹² Initially, this theoretical framework advanced women's rights rapidly within the legal system.⁹³ However, such a position can easily be turned

89. Radical feminists, many of whom are essentialists, criticize the approach of liberal feminism, particularly with regard to pornography. Such feminists construe liberalism to be a philosophy which mirrors male supremacy, adopts male language and attitudes, and fails to analyze women's fundamental differences from men. The most prominent white American and British radical feminist literature includes: M. DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* (1978); A. DWORKIN, *INTERCOURSE* (1987); A. DWORKIN, *WOMAN HATING* (1974); S. JEFFREYS, *ANTICLIMAX: A FEMINIST PERSPECTIVE ON THE SEXUAL REVOLUTION* (1990); S. JEFFREYS, *THE SPINSTER AND HER ENEMIES: FEMINISM AND SEXUALITY 1880-1930* (1985); C. MACKINNON, *FEMINISM UNMODIFIED: A DISCOURSE ON LIFE AND LAW* (1987).

90. The Supreme Court has at times adopted this view. See *Reed v. Reed*, 404 U.S. 71 (1971) (upholding a woman's claim that she was equally as qualified as a man to administer an estate).

91. Christine Littleton differentiates "symmetrical" from the "asymmetrical" approaches to equality. The "symmetrists" deny any significant natural difference between men and women and warn of the dangers of seeing women as different from men. The "essentialists," or "asymmetrists," desire recognition based on femininity, pregnancy, or other sociological differences between the sexes, regardless of differences of race and class, for example, amongst women. Within this debate, women of color have begun a rebuttal, sternly criticizing both "essentialists" and the "symmetrists" for ignoring racial difference. See generally Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279.

92. See Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99; Williams, *Equality Crisis: Some Reflections on Culture*, 7 WOMEN'S RTS. L. REP. 175 (1982).

93. The modern era of the constitutional doctrine of gender equality began with *Reed v. Reed*, 404 U.S. 71 (1971), where the Court applied a "mere rationality" standard and struck down a statute which preferred men over women as administrators of estates. Two years later, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court struck down a statute which allowed servicemen to claim their wives as dependent, whether or not they were in fact dependent on the men. A servicewoman, on the other hand, could not claim her husband as a dependent unless he depended upon her in fact. The Court abandoned the mere rationality standard and stated that classifications based on gender are "inherently suspect" and must be subject to "strict scrutiny." In *Craig v. Boren*, 429 U.S. 190, 197 (1976), the Court adopted a standard of review for sex discrimination cases that is less demanding than "strict scrutiny," but more demanding than the rational basis standard. This new test was elaborated by Justice Brennan: "The classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.*

against women, since it elides the basic social inequalities which lead to such oppression.

The proponents of "asymmetrical models of sexual equality,"⁹⁴ or "essentialists,"⁹⁵ concentrate instead on the unique differences between women and men which demand special accommodations and rights. An application of this model is the view that when pregnancy issues arise, women should be treated differently, but when issues of cultural or other "differences" arise, they should be analyzed under an equal treatment model.⁹⁶ From this perspective, the abolition of overt sex categories does not alter the maleness of American institutions, nor does it directly attack the deeper structure of male dominance.⁹⁷ The essentialists argue that "symmetrists" perpetuate the assimilation of women into male models.⁹⁸

The current feminist debates emerge as a struggle to define the goals of women: whether to stress the "differences" between women and men as a means to achieve legal equality,⁹⁹ whether to give priority to concepts of human nature,¹⁰⁰ or whether to focus on notions of feminine nature.¹⁰¹

94. This term is borrowed from Littleton, *supra* note 91.

95. For a discussion of essentialism in feminist theoretical discourse, see West, *Jurispudence and Gender*, 55 U. CHI. L. REV. 1, 13-42 (1988).

96. For "asymmetrists," equality for women requires at least some legal responses to women's particular circumstances. See Law, *Rethinking Sex and the Constitution*, 132 U. PENN. L. REV. 955 (1984); see also Littleton, *supra* note 89.

97. For example, Catharine MacKinnon makes powerful arguments that merit is a notion built on sex, race, and class bias. Equality as currently defined is a hollow and meaningless concept which rests on male standards. In questions of equality, the question must be: "who gets hurt?" If the answer is women, but not men in a similar context, then gender discrimination exists. See C. MACKINNON, *supra* note 89, at 32-45.

98. See Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977) (arguing that strict equality theory forces bare assimilation into the dominant culture). The debate between "essentialists" and "symmetrists" culminated with *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), for which feminists wrote briefs on both sides. The question was whether a California statute which provided that an employer may not refuse to allow an employee affected by pregnancy, childbirth, or related conditions, to take an unpaid leave up to four months and still have her job upon return to the workforce, was consistent with the federal Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000(e)), which requires less of employers. Christine Littleton supported an interpretation of the Act as a floor beneath which pregnancy related conditions may not drop, not as a ceiling above which they may not rise. She took the position that only women are threatened with job loss when they reproduce, therefore the Court should provide additional protection to women. On the other hand, the National Organization for Women, among others, asked the Court to strike down the statute on egalitarian grounds, because the statute singled the condition of pregnancy out for "special treatment." See Littleton, *supra* note 91.

99. There are various schools of "difference." For example, some theorists stress attitudinal and behavioral, as well as biological, differences between men and women. These differences lead men and women to reason morally in radically different ways. See C. GILLIGAN, *supra* note 86. A second school stresses equality and similarity in all aspects, except biological functioning. See, e.g., Law, *supra* note 96.

100. See M. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990).

101. This line of thought focuses on the feminine as an "imaginative universal," translating myths creating the ideal of femininity into feminist jurisprudence. See Cornell, *The Doubly-*

Martha Minow describes three versions of the dilemma of difference experienced in contemporary jurisprudence. First, she explains, is the contradiction that we can recreate difference both by ignoring it and by noticing it. Second, there is the puzzling question of neutrality. What does it mean in the context of difference? Whose version of reality is neutral? The third version rests on a balance between judicial discretion, which may acknowledge difference, and formal rules, which restrain decisionmakers and prevent a direct confrontation of difference.¹⁰² The dilemma of difference arises from comparative points of view. Who decides the point of reference from which difference begins? Which differences are benign, which socially produced, and which essential? How is difference linked to social inequities and discrimination?

The problem of gender difference and equality is paramount to thinking about an adequate framework for a woman's integral independence. There are strong arguments on all sides, but the analysis remains limited to biological differences or female essences. These dialogues concentrate on women's biological functions, most specifically on pregnancy.¹⁰³ Although conclusions often differ, when feminists and conservatives debate "real" differences, they often share the assumption that the relationship between gestation and the moral development of women is rooted in biology, instead of cultural construction. Motherhood is observed differently depending on the social body.¹⁰⁴ What all of these theories miss are the many factors which, when combined with her gender, serve to make each individual woman unique.

C. *The Forgotten Essences of Womankind*

The comfort of analyzing sexual discrimination in terms of biology or

Prized World: Myth, Allegory and the Feminine, 75 CORNELL L. REV. 644 (1990). For a century-long historical criticism of this theory, see E. BADINTER, *supra* note 81, at 121.

102. Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12-13 (1987). On the first difference, she notes that decisions about employment, benefits, and treatment in society should not turn on an individual's race, gender, religion, or membership in any other group. The second creates a problem, since government neutrality is based on fixed norms, which are subjective. The third version permits individualized decisions, but the question remains: "Who makes the decisions on a case by case basis?" *Id.* at 12.

103. In present jurisprudence, there is no mutual disinterest. The Justices' paternal interest in preserving a sex discriminatory society is strong and camouflaged under the characterizations of "natural," "irrelevant," or "justified." See *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upheld exclusion of women from the practice of law noting that women who are not mothers are the exception rather than the rule). Conflicts surrounding women's pregnancies continue to plague society, and by extension, the Court. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (statutory ban on use of public employees and facilities for abortions is constitutional); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Pennsylvania restrictions of abortion rights are unconstitutional); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy from risks covered by state employees insurance plan does not constitute sex discrimination); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion falls within constitutional right of privacy).

104. The glorification of motherhood is a fairly recent concept born during the European period of Romanticism. The aggrandizement of woman as mother paralleled the state and church's goal to increase colonial Europe's population and reinforce the monogamous family. See E. BADINTER, *supra* note 81.

ethics¹⁰⁵ allows theorists, many of whom are white, to ignore differences among women and the contributions of non-white, non-Western ethics. By considering or disregarding biological approaches to equality, the debate reduces all females to one womb.¹⁰⁶ Many "feminine" myths take the experiences of economically advantaged white women as representative of those shared by all women.¹⁰⁷ Thus the experiences of poor women and women of color are submerged within classist and racist myths.¹⁰⁸ Yet in the continuing feminist struggle, many white feminists admonish distressed women of color to avoid divisiveness, claiming that all "sisters" need to focus on their essence as women. In rebuttal is the cry of racism and exclusivity within the "white women's movement."¹⁰⁹ The general consensus among women of color remains that racism is the primary obstacle to their participation in majority women's groups.¹¹⁰ Without a doubt, the feminist movement is laudable for

105. In Gilligan's work, the dialectics of the "ethic of care" versus the "ethic of autonomy" revolve around maternity, motherhood, or being raised by a woman. C. GILLIGAN, *supra* note 86, at 62-65.

106. Asserting that women's lives are not autonomous but relational, essentialists are speaking in terms of a woman's biology, reproductive capacity, and social obligation to nurture and care for children, men, and the weak. Biology becomes the actual experience of women. See, e.g., West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

107. B. HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* (1984); E. SPELMAN, *IN-ESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Frye, *On Being White: Thinking Toward a Feminist Understanding of Race and Race Supremacy*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 110 (1983); Omolade, *Black Women and Feminism*, in *THE FUTURE OF DIFFERENCE* 247 (H. Eisenstein & A. Jardine eds. 1980);

108. See S. DE BEAUVOIR, *supra* note 59. Many of our society's myths either oppress or glorify daily situations. Myths about women of color are particularly devastating to their images. European culture portrays women of color depending on their race. For a devastating image of Asian women, see Edwards, *Oriental Girls, the Ultimate Accessory*, GENTLEMAN'S Q., Oct. 1990, (British ed.). Women of African descent have long suffered from the myth of the "Black male castrator," a derivative of her failure to reach the pristine level of white women. The myth contains her in a double oppression. See Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

109. Black scholars have looked at "reverse discrimination" cases, in which white women brought actions alleging that law school affirmative action programs regarding minority admissions violated their constitutional and civil rights, see, e.g., *Henson v. University of Arkansas*, 519 F.2d 576 (8th Cir. 1975); *Stewart v. New York University*, 430 F. Supp. 1305 (S.D.N.Y. 1976); *Timmerman v. University of Toledo*, 421 F. Supp. 464 (N.D. Ohio 1976), to show that white women use the same weapons white men use to oppress black women. White women are often unwilling to identify the particular historical problems black women have faced. See E. HOOD, *Black Women, White Women: Separate Paths to Liberation*, in *THEORETICAL PERSPECTIVES* 200 (1986).

110. The fact that most feminist organizations and communities are based on a white women's model makes the participation of women of color problematic. This was particularly poignant for Black women during the first wave of American feminism in the late 19th century when feminists were faced with the decision whether to support the Fifteenth Amendment extending suffrage to Black men, but not to women of any color. Racism was pointedly clear in the thought of Susan B. Anthony, who wrote:

While the dominant party have with one hand lifted up TWO MILLION BLACK MEN and crowned them with the honor and dignity of citizenship, with the other they have dethroned FIFTEEN MILLION WHITE WOMEN — their own mothers

its efforts to define methodological systems to eradicate patriarchy. However, the fact remains that the white women's struggle has always closely tailed civil rights movements, rather than working to include the perspectives of people of color within its own framework.¹¹¹ Also, while the "symmetrists" claim that they must eliminate the differences constructed between men and women to avoid discourse on "female essence"¹¹² and to honor differences among women, little effort has been made to welcome non-white women in their "club." Such women neglect to consider what Kimberle Crenshaw calls the "intersectionality" of race, gender, and class.¹¹³ For many women of color, gender and race are not separate and distinct vehicles of oppressive majoritarian institutions in their lives. Nevertheless, many white women tend to ignore race unless they are directly confronted with the issue.¹¹⁴

Theories that exclude individuals or promote separatism cannot lead to moral justice and integral independence. If Audre Lorde is correct, racism, sexism, and other forms of oppression stem from an inability to recognize or tolerate the notion of difference as a dynamic and enriching force.¹¹⁵ A common note, however, may harmonize the cacophony of Babylonian voices: the desire to be treated as moral¹¹⁶ or integral persons. All of these differences in

and sisters, their own wives and daughters — and cast them under the heel of the lowest orders of manhood

See P. GIDDINGS, *supra* note 78, at 66.

111. Giddings notes that a "disturbing aspect of the women's movement was that its rise coincided with the deterioration of the Black movement." *Id.* at 308. She continues:

Feminism has always had the greatest currency in times of Black militancy or immediately thereafter. This was true in the 1840's and 1850's, in the post-World War I years, and in the 1960's. Conversely, new gains for women become more difficult to attain when Black issues are not high on the national agenda or the national consciousness. This pattern held true for the Seventies, the decade of struggle for the Equal Rights Amendment.

Id. at 340. Given the noted hostility of the civil rights movement to women's rights, the Black woman still faces the burden of double oppression.

112. Angela Harris describes "gender essentialism" as the notion that there is a monolithic "women's experience" that can be described independently of other experiences including race, class, and sexual orientation. But without a theory that can shift focus from gender to race and other facets of identity and back again, dominance theory is ultimately crippled. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588, 594 (1990).

113. See Crenshaw, *supra* note 108, at 114.

114. See B. HOOKS, *supra* note 107, at 12 ("From the outset of my involvement with the women' movement, I was disturbed by the white woman liberationist's insistence that race and sex were two separate issues. My life experience had shown me that the two issues were inseparable, that at the moment of my birth, the two factors determined my destiny").

115. Lorde, *Scratching the Surface: Some Notes on Barriers to Women and Loving*, in THE FUTURE OF DIFFERENCE 432 (H. Eisenstein & A. Jardine eds. 1980) ("[I]f we do not define ourselves as ourselves, we will be defined by others — for their use and to our detriment.").

116. The word "morality" is also content-based and thus used with important caveats. In the search for a different historical definition of morality than the framework we currently have, consider that:

The public morality . . . is characterized [by] claims to universality, impartiality, reciprocity, universalizability The proper moral agent is seen as an abstract, detached, isolated identityless autonomous individual whose actual position and identity in the just society are hidden behind a 'veil of ignorance.' Private morality, then,

their combinations and intersections serve to create each woman as an integral moral actor. With this understanding it becomes possible to return to Rawls and envision a theory of justice that addresses the sexual contract.

III.

TOWARD A FEMINIST RECONSTRUCTION OF RAWLS

"Neither the utilitarian theory, the Marxist theory, nor the mainstream white middle-class feminist theory can objectively encompass all human beings into a single moral person."¹¹⁷ Rather than dismiss Rawls' theory for ignoring the sexual discrimination inherent in Western political thought and history, we can deconstruct the division between the social and sexual contracts and rebuild a theory of justice within the Rawlsian paradigm. As argued above, Rawls' omission of marriage as a bastion of both Western¹¹⁸ and non-Western civilizations¹¹⁹ is detrimental to his theory of justice. However, Rawls' theory of justice can be extended to the private sphere to assure integral equality for women. Showing respect to a person as a moral being is the first step toward assuring integral independence.¹²⁰

Many feminist theorists reject Rawls' theory. Mari Matsuda argues that Rawls' reasoning concerning the original position arises from a set of limited assumptions that are worked into the original position.¹²¹ Abstraction, she contends, is the "first step down the road of androcentric ignorance."¹²² To her, abstraction and detachment are methods to avoid the discomfort of direct

pertains to the domain of the personal. It is immediate, situation specific, focused on particular individuals and relationships. The first stage in the process equates public morality with morality *pro se*. This equation leads to a profound devaluing of private or personal morality . . .

Morgan, *supra* note 34, at 152.

117. Harris, *supra* note 112, at 588.

118. See S. OKIN, *supra* note 18. Marriage makes women vulnerable due to a devaluation of human productive work. A lack of justice in the private sphere of gender leads to a lack of justice in the public sphere of the work place, in the professional world, and in politics.

119. Where theocracy and law are intricately related, women are traditionally considered to be chattel and legally subordinate to men, as their duty in life is to obey father, husband, brother, and, if widowed, son. For a discussion of the status of married women in traditional Judaic and Islamic law, see Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1 (1982).

120. J. RAWLS, *supra* note 2, at 337. However, since the original position is to be understood as a purely hypothetical situation, the assumption is that the Justices of the Supreme Court could also enter into a position where morality and justice will serve them. For Richards the constitutional order should be based on a moral theory. "[M]oral theory of constitutional order is premised on the Kantian idea that democratically elected legislatures and executives are limited by constitutionally imposed constraints that limit majoritarian political power, rendering certain fundamental civil and human rights legally immune from political bargaining." D. RICHARDS, *THE MORAL CRITICISM OF LAW* 167 (1977).

121. Matsuda, *Liberal Jurisprudence*, *supra* note 17, at 624.

122. Legal history is rife with examples. The abstract principle that women as the weaker sex belong in a separate sphere . . . supported the rule preventing married women from owning property . . . similarly, . . . the legal guarantee of equal pay for equal work has created an abstract condition called 'equality' . . . as equal pay for work of equal value. . . . This is not to suggest that the abstraction of 'equality' lacks

confrontation with concrete oppression.¹²³ Liberals use abstraction to discuss liberty, property, and rights, but lack connection to “real people’s lives.”¹²⁴ As a result, Matsuda claims, Rawls’ theory fails precisely because his method of inquiry is abstraction.¹²⁵

Matsuda’s criticism of abstraction is inadequate on two points. First, much of society rests on abstract principles that have been transformed into reality. “Real people’s lives” may incorporate abstract principles that are turned into models of human and political behavior to either elevate souls or debase spirits. An abstract principle carries the potential to materialize into a system of justice or injustice. The “fact” that women are the weaker sex and belong in a separate, private sphere began as an abstract principle.¹²⁶ The principle that whites are superior to non-white races is an abstraction as well. Religions are sets of abstract principles which have assisted men in conquering continents. Revolutionary socialism is an abstract principle of economic equality which shaped the geopolitics and lives of billions of people in the twentieth century.

Moreover, in her search for Rawls’ connection to the concrete, Matsuda, as a woman of color, engages in a contradiction. She praises the act of “consciousness-raising” as a methodology for theory building.¹²⁷ However, consciousness-raising created the abstract and exclusive feminism which non-white women have bitterly criticized. Consciousness-raising was a significant political vehicle for white women whose access to power was limited solely by a husband, father, or brother, and the system to which the men belonged. Consciousness-raising was not accessible to women of color as a methodology.¹²⁸ Matsuda assumes that non-egotistical tendencies are natural to wo-

instrumental value to feminists. Rather, for women, the pursuit of equal rights as an abstract goal was developed around tangible manifestations . . .

Id. at 619-20.

123. For example, Matsuda examines the notion of the veil of ignorance in a plausible fashion: “The use[s] of . . . the veil of ignorance are classically abstract theory-building devices reminiscent of other well known philosophical abstractions . . . In much of veil imagery — the bridal veil, the Muslim veil — it is women-as-object behind the veil . . . Behind Rawls’ veil, woman thinking, the terrifying Other, is abstracted out.” *Id.* at 616. However, the use of Rawls’ “veil” can also be perceived from another perspective. The oft-used metaphor of Du Bois’ “two souls” also elicits the image of a veil. “The Negro is a sort of seventh son, born with a *veil* and gifted with second sight in this American world, a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double consciousness . . .” W.E.B. DU BOIS, *SOULS OF BLACK FOLK* (1973) (emphasis added).

124. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN’S RTS. L. REP.* 7, 9 (1989).

125. Matsuda, *Liberal Jurisprudence*, *supra* note 17, at 613.

126. *Id.* at 619.

127. *Id.* at 621.

128. Consciousness-raising was a fundamental technique of liberation for the isolated white middle-class suburban woman of the 1960s. See B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963). Third World women have different historical experiences, in that verbal and cultural exchanges with other women in their community have been and remain a vital part of their emotional and economic lives and of their oral histories. However, to date, we have not used

men and that we are all loving, caring, and uninterested in advancing the self before the community. While she dismisses Rawls' abstract theory because it is not grounded in a socio-political reality, she glorifies the product of an historical fiction.

The most fundamental characteristic to develop in a theory of justice that includes all women is integral independence. The social contract might abstractly guarantee a woman's moral independence as a voting and participatory citizen. But the sexual contract will nevertheless thwart or deny her integral independence.¹²⁹ If we follow Rawls' theory, a woman will attain integral independence where she can conceive of her own good¹³⁰ and develop through education her own sense of justice. Lacking these attributes is "regarded as a defect of deprivation"¹³¹ and prevents full and equal participation in the social contract. A woman must realize the social injustices imposed against her and develop and apply the principles of justice to her own situation.¹³²

A woman's integral independence that derives from Rawls' sense of individuality need not necessarily be understood as egotistic and androcentric.¹³³ Rather, the Rawlsian logic can be compared to Virginia Woolf's petition that each woman must have "a room of her own,"¹³⁴ a place to develop her individuality, rather than self-interest. "A room of one's own" parallels the Rawlsian concept of "essential unity of self" provided by the conception of right.¹³⁵ Moreover, this notion of individuality as a catalyst for moral independence is discordant with notions of individualism. Individuality allows a person to grow morally, whereas individualism separates a human being from her peers.¹³⁶ Individuality allows a woman a private relationship between herself

our age-long exchanges of common experiences as a methodology to eradicate patriarchy, but instead, as a procedure for survival.

129. On the foregoing analysis of this Note, it is apparent that the traditional socio-legal system did not encourage freedom to choose role assignments during marriage, nor the ability to develop full potential in an environment free of sex-based concepts for either husband or wife.

130. "[A] person's good is determined by what is for [him] the most rational plan of life given reasonably favorable circumstances." J. RAWLS, *supra* note 2, at 395.

131. *Id.* at 506.

132. *Id.* at 505.

133. Rawls characterizes an egoist as "someone committed to the point of view of *his* own interests. *His* final ends are related to *himself*: *his* wealth and position, *his* pleasures and social prestige." *Id.* at 568 (emphasis added).

134. V. WOOLF, *supra* note 20.

135. "Woolf's use of spatial metaphor in *A Room* presumes the existence of two realities/idealities of capitalist patriarchy: (1) 'private property,' and (2) 'proper position,' or place, within a hierarchical structure." Solomon, *Staking Ground: The Politics of Space in Virginia Woolf's A Room of One's Own and Three Guineas*, 1989 WOMEN'S STUDIES 332. I would not limit Woolf's call for space to economics. We can read it to include space to allow women to meditate, think, and reflect on life as autonomous persons, just as men have been granted the right to contemplate and write.

136. David A.J. Richards compares the right to privacy with the freedom of conscience and religion:

We regard religious belief, practice, and even action (when not violating compelling secular interests) as private matters, not because we associate religion with informa-

and her supreme being, and fosters an ultimate right to the privacy of her own body. Individuality disallows society to define her in the essentialist terms of reproductive biology and other stereotypical predetermined images. All her choices as an individual are her own. Neither society nor man should penalize a woman for making independent choices.¹³⁷

Finally, Rawls' theory offers a universal form of equity because his conception of justice expresses notions of the person, of relations between persons, and of the general structure and ends of social cooperation.¹³⁸ Each member of society deserves equal respect and consideration in determining the regulatory principles of society. If women share that equal and moral right to define society's institutions, then the theory's application could surpass any degree of justice Western history has thus far granted to women. Since the Rawlsian theory stipulates that equality does not rest on natural attributes such as gender, physical differences, or talent, bias fixed on subjectively defined natural attributes is at odds with the concept of equality. As a participant in elaborating the principles of justice, a woman could assure a moral social structure that would not limit her fundamental liberties, and her freedom of conscience could be exercised to the fullest capacity.

CONCLUSION

"The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation."¹³⁹ This Note has shown the need to eliminate the artificial masculine/feminine bipolarity similar to those of mind and matter, reason and instinct, light and darkness, pleasure and pain. Women have an inherent right to be perceived and respected in light of the standards of justice. The deprivation of woman's integral independence stems from a sexist education and an oppressive political and legal system. Existing social norms do not encourage a woman to foster her individuality.¹⁴⁰ Instead, she has learned to excel, or at least has attempted to

tional privacy. . . . Rather, our commitment to the right of conscience associates integrity itself with the control of each person over the formation of the ultimate aims of moral powers

D. RICHARDS, *TOLERATION AND THE CONSTITUTION* *supra* note 22, at 243.

137. Women are systematically chastised if they do not accept social norms attributed to them. Adrienne Rich explains that heterosexuality is an institution, and that "[l]esbian existence comprises both the breaking of a taboo and the rejection of a compulsory way of life. It is also a direct attack on the male right of access to women . . ." A. RICH, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 139, 157 (1980). Certainly this applies as well to the women among us who are witches, spinsters or just plain revolutionary.

138. J. RAWLS, *A Kantian Conception of Equality*, in *POST ANALYTIC PHILOSOPHY* 201 (J. Rajchman & C. West eds. 1985).

139. J. RAWLS, *supra* note 2, at 141.

140. See Allen, *supra* note 23, at 461. Allen states that:

Women's relationship to privacy has been difficult. On the whole, women have had too much of the wrong kinds of privacy. They have had modesty, chastity and family homes, when what they needed were forms of privacy that foster moral independence.

excel, in community-based, altruistic activities, which both a male-dominated society and many well-respected feminists have at times termed innate feminine differences.

The essential woman is someone trapped in another person's sphere of existence. Her integrity cannot count, for she has no independence. So Rawls asks: "Is the family to be abolished then?"¹⁴¹ The question is misphrased, because it examines the institution as an ahistorical occurrence rather than as a product of history. Answering his question, Rawls grants that "within the context of the theory of justice as a whole, there is much less urgency to take this course."¹⁴² Yet the urgency to examine the family, to contextualize the sexual contract, has fallen upon us.

A "well-ordered" society would require that each woman, regardless of her status in the land of motherhood, have a room of her own, which would enable her to control her eroticism¹⁴³ and, ultimately, her destiny. Gender equality translates into the need for integral independence in childrearing, in political decision-making, and in claiming precepts of justice.¹⁴⁴ The precepts of justice exist: they are for women to seize.

Traditional caretaking roles have kept women's lives centered in privacy of the nuclear family home.

Id.

141. J. RAWLS, *supra* note 2, at 511.

142. *Id.*

143. Power over a woman's sexuality is at the core of male oppression. As I have emphasized throughout this Note, the obsession of the courts, the legislature, the media, the prostitution industry, religious institutions, and last, but not least, the family, with women's uteri is the desire to control women's bodies. Conversely, from a female point of view, eroticism and control over one's body is central to the self, to creativity, expression, and communication.

144. J. RAWLS, *supra* note 2, at 563.

